# Kiew Foo Mui & Ors v Public Prosecutor

SUPREME COURT (KUCHING) — CRIMINAL APPEAL NOS 05–31–94, 05–43–94 AND 05–30–94
EDGAR JOSEPH JR, MOHAMED DZAIDDIN FCJJ AND GOPAL SRI RAM JCA
15 NOVEMBER 1995

***Criminal Procedure*** *— Trial — Voluntariness of statement — Voir dire held — Statement allowed in evidence — Whether prosecution must recall voir dire witnesses to give evidence at trial proper — Whether defence must be allowed to cross-examine again — Whether defence can waive right to have witnesses recalled — Duty of judge*

***Criminal Procedure*** *— Trial — Trial with assessors — Voluntariness of statement determined at voir dire — Statement allowed — Failure of prosecution to recall voir dire witnesses to give evidence at trial proper — Whether fatal — Whether failure of justice same as miscarriage of justice — Criminal Procedure Code (FMS Cap 6) s 422*

***Evidence*** *— Character of accused — Bad character adduced by prosecution — No objection taken by defence — Whether judge has duty to stop prosecution from adducing evidence — Evidence Act 1950 s 54*

The appellants were convicted of murder under s 302 of the Penal Code (FMS Cap 45) ('the Code'), read with s 34 of the Code, after a trial before a judge with the aid of assessors. The first and third appellants were sentenced to death whilst the second appellant was sentenced to be detained during the pleasure of the Governor of Sabah as he was under the age of 18 years on the date of the alleged offence. The prosecution's case depended upon circumstantial evidence and the cautioned statements of each of the appellants. The defence objected to the admissibility of the statements and a trial within a trial was held, in the absence of the assessors, to determine their admissibility. Witnesses were called by the prosecution to establish the voluntariness of the statements and they were cross-examined by the defence. The appellants gave evidence alleging that the cautioned statements had been made as a result of inducement, threats and assaults by persons in authority, and were thus involuntary. The judge, however, held that they had been made voluntarily and were admissible. When the trial proper resumed in the presence of the assessors, the cautioned statements were then read in evidence. However, the prosecution witnesses who had testified during the trial within a trial were not recalled by the prosecution to repeat their testimony before the assessors, nor did the defence apply to recall them for cross-examination. The issue before the court was whether the omission was so serious as to justify the quashing of the convictions.

**Held**, allowing the appeals:

(1) It is clear law that if the challenge to the admissibility of a confession fails in a trial within a trial, it is the duty of the prosecution to ensure that the evidence of the confession and the

circumstances in which it had been obtained are given in the presence of the jury or the assessors. Here, as the prosecution witnesses had not been recalled by the prosecution to repeat their testimony before the assessors, the defence had lost the opportunity to cross-examine these witnesses all over again on the issue of voluntariness.

(2) It is of fundamental importance to the administration of criminal justice that the accused person should feel that he has had a fair trial. The mistake of his counsel in omitting to apply for the recall of the prosecution witnesses did not relieve the prosecution of its duty to ensure that they were recalled, for to hold to the contrary would be to reverse the onus of proof with regard to cautioned statements, which at all times, lay upon the prosecution. Neither could there be a waiver by the defence of such a requirement. The judge also has an automatic duty to remind the prosecution of its duty and defence counsel of their corresponding right.

(3) The expression 'failure of justice' is synonymous with 'miscarriage of justice'. The effect of the breaches of the respective duties imposed by law on the prosecution, defence and judge was to sever an important artery of evidence from the consideration of the assessors, in as far as the defence were concerned, thereby occasioning a failure of justice within the meaning of s 422 of the Criminal Procedure Code (FMS Cap 6).

**Per curiam**:

The judge had, in his summing up, referred to evidence that the appellants were seen fleeing from the scene of the crime in a stolen car. This was evidence which could imply bad character and was plainly inadmissible as the defence had not attempted to adduce evidence of the appellants' good character or impugn the character of any of the prosecution's witnesses under s 54 of the Evidence Act 1950. Even though the defence had not objected, the judge was not relieved of the duty of stopping the prosecution from adducing it, as inadmissible evidence does not become admissible simply by reason of failure to object. However, it was unnecessary for this court to decide on the effect of the admission of the inadmissible evidence in the light of its earlier finding.

**[Bahasa Malaysia summary**

Perayu-perayu telah disabitkan atas tuduhan membunuh di bawah s 302 Kanun Keseksaan (NMB Bab 45) ('Kanun itu'), dibaca dengan s 34 Kanun itu, selepas perbicaraan di hadapan hakim dengan bantuan pengapit. Perayu yang pertama dan ketiga telah dihukum mati sementara perayu kedua dijatuhkan hukuman tahanan mengikut kehendak Gabenor Sabah kerana beliau di bawah umur 18 tahun pada tarikh kesalahan itu dikatakan berlaku. Kes pihak pendakwaan bergantung pada keterangan ikut keadaan dan pernyataan beramaran

setiap perayu. Pihak pembelaan telah membantah terhadap kebolehterimaan pernyataan-pernyataan itu dan suatu perbicaraan dalam perbicaraan telah diadakan, tanpa kehadiran pengapit, untuk memutuskan kebolehterimaan pernyataan tersebut. Saksi-saksi telah dipanggil oleh pihak pendakwaan untuk membuktikan bahawa pernyataan itu telah dibuat dengan sukarela dan mereka telah diperiksa balas oleh pihak pembelaan. Perayu telah memberi keterangan yang mengata bahawa pernyataan beramaran itu telah dibuat akibat dorongan, ugutan dan serangan oleh mereka yang berkuasa, dan oleh itu tidak dibuat dengan sukarela. Hakim, bagaimanapun, memutuskan bahawa pernyataan itu telah dibuat dengan sukarela dan boleh diterima. Apabila perbicaraan yang utama diteruskan dengan kehadiran pengapit, pernyataan beramaran itu telah diberikan sebagai keterangan. Walau bagaimanapun, saksi pendakwa yang memberikan testimoni semasa perbicaraan dalam perbicaraan tidak dipanggil balik oleh pihak pendakwaan untuk mengulangi testimoni itu di hadapan pengapit, dan pihak pembelaan pun tidak memohon untuk memanggil mereka semula untuk diperiksa balas. Isu di hadapan mahkamah ialah sama ada peninggalan itu begitu serius sehingga menjustifikasikan pembatalan sabitan-sabitan itu.

**Diputuskan**, membenarkan rayuan-rayuan itu:

(1) Ia adalah undang-undang yang jelas bahawa jika cabaran kepada kebolehterimaan sesuatu pengakuan salah gagal di perbicaraan dalam perbicaraan, adalah menjadi kewajipan pihak pendakwaan untuk memastikan bahawa keterangan mengenai pengakuan salah itu dan keadaan bagaimana ianya diperolehi diberikan di dalam kehadiran juri atau pengapit. Di sini, oleh kerana saksi-saksi pihak pendakwaan tidak dipanggil semula oleh pihak pendakwaan untuk mengulangi testimoni mereka di hadapan pengalit, pihak pembelaan telah terlepas peluang untuk pemeriksaan balas semua saksi itu semula atas isu kesukarelaan.

(2) Adalah menjadi kepentingan utama di dalam pentadbiran keadilan jenayah bahawa seseorang tertuduh mesti berasa bahawa beliau telah mendapat perbicaraan yang adil. Kesilapan peguambelanya yang tidak membuat permohonan untuk memanggil semula saksi pihak pendakwaan untuk pemeriksaan balas tidak melepaskan pihak pendakwaan daripada kewajipannya untuk memastikan bahawa mereka dipanggil semula, kerana jika diputuskan sebaliknya, ini akan menterbalikkan beban membukti berkenaan dengan pernyataan beramaran, yang pada setiap masa terletak atas pihak pendakwaan. Juga, tidak boleh terdapat penepian keperluan sedemikian oleh pihak pembela. Hakim juga mempunyai kewajipan yang automatik untuk mengingatkan pihak pendakwaan mengenai kewajipannya dan peguam pembela mengenai hak tersebut.

(3) Ungkapan 'kegagalan keadilan' adalah serupa dengan 'salah laksana keadilan'. Kesan perlanggaran kewajipan yang dikenakan

oleh undang-undang ke atas pihak pendakwaan, pembela dan hakim adalah untuk memutuskan arteri keterangan yang penting daripada pertimbangan pengapit, sejauh mana pembelaan terbabit, yang membawa kepada kegagalan keadilan mengikut makna s 422 Kanun Acara Jenayah (FMS Cap 6).

**Per curiam**:

Hakim apabila menggulung perbicaraan telah merujuk kepada keterangan bahawa para perayu telah dilihat sedang lari dari tempat kejadian jenayah dalam sebuah motokar yang dicuri. Ini adalah keterangan yang mungkin membayangkan kelakuan jahat dan jelas tidak boleh diterima kerana pihak pembela tidak mencuba untuk mengemukakan keterangan mengenai kelakuan baik para perayu atau mempersoalkan kelakuan mana-mana saksi pihak pendakwa di bawah s 54 Akta Keterangan 1950. Walaupun pihak pembela tidak membantah, ini tidak melepaskan hakim daripada kewajipannya untuk memberhentikan pihak pendakwaan daripada mengemukakannya, kerana keterangan tidak boleh terima tidak menjadi boleh terima hanya atas alasan kegagalan membantah. Bagaimanapun, adalah tidak perlu untuk mahkamah ini membuat keputusan atas kesan penerimaan keterangan yang tidak boleh terima itu memandangkan keputusannya yang lebih awal.]

**Notes**

For cases on trial with assessors, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3176–3179.

For cases on character evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 361–383.

**Cases referred to**

*Krishna Murthy v Abdul Subban* (1965) 1 Cr LJ 565 (folld)
*Mraz v R* (1955) 93 CLR 493 (folld)
*PP v Lin Lian Chen* [1992] 2 MLJ 561 (refd)
*PP v Mohamed Noor bin Jantan* [1979] 2 MLJ 289 (refd)
*Prasad v R* [1981] 1 All ER 319; [1981] 1 WLR 1697; (1980) 72 Cr App R 218 (refd)
*R v Murray* [1951] 1 KB 391; (1951) 34 Cr App R 203 (folld)
*Yaacob v PP* [1966] 1 MLJ 67 (distd)

**Legislation referred to**

Criminal Procedure Code (FMS Cap 6) s 422
Evidence Act 1950 s 54
Penal Code (FMS Cap 45) ss 34, 302
Criminal Appeal Act 1912 s 6(1) [NSW]
Criminal Procedure Code s 535(1) [Ind]

**Appeal from**: Criminal Trial No KG3 of 1992 (III) (High Court, Kuching)

A *Anthony Tai* (*Anthony Tai*) for the first appellant.
*JB Singh* (*JB Singh & Co*) for the second appellant.
*Charles Kanavathi* (*Charles Kanavathi & Co*) for the third appellant.
*Abang Iskandar bin Abang Hashim* (Deputy Public Prosecutor) for the respondent.

B **Edgar Joseph Jr FCJ** (delivering the grounds of judgment of the court): These appellants had been convicted upon a charge of murder in contravention of s 302 of the Penal Code (FMS Cap 45) ('the Penal Code'), read with s 34 of the Penal Code, after a trial before a judge with the aid of assessors. The first and third appellants were sentenced to death C whilst the second appellant was sentenced to be detained during the pleasure of the Governor of Sabah, he being under the age of 18 years on the date of the alleged offence.

The case for the prosecution depended upon a substantial body of circumstantial evidence and the cautioned statements of each of the D appellants, there being no eyewitness to the killing, but in the view we took of one of the grounds of appeal it is unnecessary for us to discuss the evidence.

Suffice it to say, that at the trial, upon objection being taken to the admissibility of the cautioned statements, the learned trial judge held a E trial within a trial, in the absence of the assessors, in order to determine their admissibility, and, at the conclusion thereof, he ruled that they had been freely and voluntarily made and, therefore, admissible.

During the trial within a trial, a number of witnesses were called by the prosecution for the purpose of establishing the voluntariness of the cautioned statements and these witnesses were cross-examined by the F defence. All the appellants gave evidence, in the course of which they had alleged that the cautioned statements had been made as a result of inducement, threats and assaults by persons in authority, which deprived the same of their voluntary character. Be that as it may, as we have already said, the trial judge ruled in favour of the prosecution and admitted the cautioned statements in evidence, after which the assessors were recalled G into court and informed by the judge of his ruling and the cautioned statements were then read in evidence.

Now, it is clear law that if the challenge to the admissibility of a confession fails, the prosecution evidence of the confession and the circumstances in which it had been obtained will be given in the presence H of the jury or the assessors, as the case may be. It is the duty of the prosecution to ensure that this is done.

In this case, however, the prosecution witnesses who had testified during the trial within a trial as to the way in which the cautioned statements had been obtained from the appellants had *not* been recalled by I the prosecution to ensure that they repeated that testimony before the assessors, with the result that the defence had lost the opportunity to cross-examine these witnesses all over again on the issue of voluntariness. To be fair to the learned trial judge, there is nothing in the record provided to show that any of the defence counsel either reminded the prosecution of

its duty to recall these witnesses nor applied to recall them for cross-examination, for this purpose. A

When the defence was called, at the trial proper, the accused persons denied the charges and went on to testify as to the way in which the cautioned statements had been obtained from them, and the judge was careful, in the course of his summing up, to advert to this part of the testimony of the accused persons and, to correctly point out to the assessors, that they were entitled to take this into account in assessing the weight and value of the cautioned statements. But, as we have already said, the prosecution evidence which had been recorded during the trial within a trial, that is to say, during the voir dire, to determine the admissibility of the cautioned statements and the circumstances in which they had been obtained, had not been given before the assessors. In these circumstances, the broad question for decision was whether this omission was so serious as to justify the quashing of the convictions. B C

In *R v Murray* [1951] 1 KB 391 at p 392; (1951) 34 Cr App R 203 at p 207, Lord Goddard, speaking for the Court of Criminal Appeal in England, said: D

> Its weight [of the confession] and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it had been obtained.

And, a little later he added: E

> This point, if there is any doubt about it, had better be settled once and for all. It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury, because if he can induce the jury to think that the confession has been obtained by some threat or promise or some means of that sort, then of course the value of the confession is enormously weakened. The weight of the evidence and the value of the evidence are always for the jury. F

In *Yaacob v PP* [1966] 1 MLJ 67, Thomson CJ speaking for our then Federal Court, quoted with approval the above passages in the judgment of Lord Goddard. G

To revert to the position in England, the case of *Prasad v R* [1981] 1 All ER 319; [1981] 1 WLR 1697; (1980) 72 Cr App R 218 shows that the jury should take into consideration all the circumstances in which a confession was made including allegations of force, if it considers they may be true, in assessing the weight and probative value of such a confession. H

To return to *Yaacob*, we note that in that case, unlike the present case, counsel for the accused *did*, after the challenge to admissibility of the confession had failed, apply to call the accused to give evidence as to the circumstances in which it was obtained, but, the application was refused. Furthermore, in *Yaacob*, unlike the present case, the jury were not told, that in considering the question whether the confession was true, they were entitled to their opinion as to the way in which the confession was taken. I

A Be that as it may, we were of the view, that it is not merely of some importance but of fundamental importance to the administration of criminal justice that the accused person should feel that he has had a fair trial. Can it be seriously contended that just because of the mistake or blunder on the part of his counsel in omitting, after the challenge to admissibility of the cautioned statements had failed, to make application to the court for the B recall of the prosecution witnesses to cross-examine them all over again — this time before the assessors — the prosecution was relieved of its duty of ensuring that these witnesses were recalled and examined-in-chief, once again, as to the circumstances in which the cautioned statements had been obtained and the defence then being given the opportunity to cross- C examine them all over again, if they so wished? The answer to this question must surely be 'no' for, to hold to the contrary, would be to reverse the onus of proof, with regard to the cautioned statements, which at all times, lay upon the prosecution. Nor, for that matter, could there be a waiver by the defence of such a requirement, unless the cautioned statement is exculpatory in nature and it is the defence, who seek its admission, in D which case, no trial within a trial need be held at all. (See *PP v Mohamed Noor bin Jantan* [1979] 2 MLJ 289; *PP v Lin Lian Chen* [1992] 2 MLJ 561.)

But, to return to the issue at hand, our enquiry had to be taken further, for we also had to consider what role (if any) the judge had to play E in the context thereof and it is this topic which we must now address.

Having regard to:

(1) the failure of the prosecution in its duty to ensure, that once the challenge to the admissibility of the cautioned statements had failed, the entire evidence of the cautioned statements and the circumstances F in which they had been obtained, would be given again, this time, in the presence of the assessors; and

(2) the failure of the defence to exercise their right to cross-examine all over again the prosecution witnesses, who had already testified on the voir dire in the absence of the assessors,

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the next question to be logically considered was whether, the learned judge remained under an automatic duty to remind the prosecution of its duty, and counsel for the defence of their corresponding right, as aforesaid.

In our view, the learned judge remained under such a duty since it is not just of some importance, but of fundamental importance to the H administration of criminal justice, that an accused person should feel that he has not been deprived of that priceless asset — namely a fair trial, notwithstanding the shortcomings of his counsel. It is axiomatic that the primary duty of a judge at any trial — whether criminal or civil — is to ensure that justice is done, no doubt, according to law.

I We then went on to consider the final question of critical substance which arose on this part of the case, namely, whether the failure of the prosecution, the defence and the learned judge, to discharge their respective duties, as aforesaid, had occasioned a failure of justice.

The expression 'failure of justice' though mentioned in s 422 of the Criminal Procedure Code (FMS Cap 6) is not defined therein for it provides:

> Irregularities not to vitiate proceedings.
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> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account —
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> of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceeding under this Code; or
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> of the want of any sanction required by section 129; or
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> of the omission to settle or revise any list of jurors or assessors;
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> of the want of qualification of any juror or assessor;
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> of the improper admission or rejection of any evidence; or
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> of any misdirection in any charge to jurors or assessors;
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> unless such error, omission, improper admission or rejection of evidence, irregularity; want or misdirection has occasioned a failure of justice.

The expression 'miscarriage of justice' occurring in s 6(1) of the New South Wales Criminal Appeal Act 1912 (equivalent to our s 422 of the Criminal Procedure Code), was construed by Fullagar J speaking for the High Court of Australia, in *Mraz v R* (1955) 93 CLR 493 at p 514, in the following terms:

> It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

Similarly, the expression 'failure of justice' occurring in s 535(1) of the Indian Criminal Procedure Code (equivalent to our s 422 of the Criminal Procedure Code) was construed by Hegde J in *Krishna Murthy v Abdul Subban* (1965) 1 Cr LJ 565 at p 576, in the following terms:

> The expression 'a failure of justice has in fact been occasioned thereby' found in s 535(1) Cr PC does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the Legislature need not have introduced the conception of 'failure of justice' in ss 535 and 537 Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chap XIX Cr PC. In law the expression

A 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537 Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the
B generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

The expression 'failure of justice' is, therefore, synonymous with the expression 'miscarriage of justice'.

In our view, therefore, the effect of the breaches of their respective
C duties imposed by law on the prosecution, the defence and the learned judge, to which we have referred, was to sever an important artery of evidence from the consideration of the assessors, so far as the defence were concerned, thereby occasioning a failure of justice, within the meaning of s 422 of the Criminal Procedure Code and the authorities to which we
D have referred and, on this ground alone, the convictions were unsustainable.

That, however, is not the end of the matter. There was a separate point — not raised by counsel — which cropped up in the course of the argument, as a result of a question from the court — namely, whether the convictions had been vitiated by the admission of certain evidence, which
E was irrelevant, inadmissible and gravely prejudicial; namely, evidence that at the material time, the appellants were seen fleeing from the scene of the crime in a *stolen station wagon*. This was plainly evidence which *could* imply that the appellants were men of bad character. That this evidence was inadmissible was plain beyond argument as, at no time, during the trial, was any attempt made by the defence to adduce evidence of the appellants'
F good character nor had any attempt been made by the defence to impugn the character of any of the prosecution witnesses (see s 54 of the Evidence Act 1950). Unfortunately, in the course of his summing up, the judge did advert to this evidence as being evidence upon which the assessors could rely so that it could be readily assumed that the assessors must have been
G swayed by it. Admittedly, the defence had *not* objected to the admission of this evidence but this did *not* relieve the judge of the duty of stopping the prosecution from adducing it, since inadmissible evidence does not become admissible simply by reason of failure to object.

However, having regard to our conclusion on the primary question of
H law regarding the procedure to be adopted if, after the voir dire, the challenge to the admissibility of the cautioned statements fails, it was unnecessary for us to express an opinion on the question of the effect of the admission of the inadmissible evidence on the convictions.

In the result, we had no option but to quash the convictions, set aside
I the sentences passed against the appellants, and order a retrial before a different judge and different assessors. In the meanwhile, we had ordered that the appellants be remanded in custody pending their retrial.

*Appeals allowed.*

Reported by Prof Ahmad Ibrahim